

Navigating Grievances:

Legal and Practical Solutions to the Problems of Government
Representation During the State Employee Grievance Process

What is a grievance?

- ARM 2.21.8012(2)
 - "Grievance" means a complaint or dispute initiated by an employee regarding the **application or interpretation of written laws, rules, personnel policies or procedures** which adversely affects the employee.

What is the standard?

- “Just cause”
- ARM 2.21.6507(8)
 - "Just cause" means **reasonable, job-related grounds** for taking a disciplinary action based on failure to satisfactorily perform job duties, or disruption of agency operations. Just cause may include, but is not limited to: an actual violation of an established agency standard, procedure, legitimate order, policy, or labor agreement; failure to meet applicable professional standards; criminal misconduct; wrongful discrimination; deliberate misconduct; negligence; deliberately providing false information on an employment application; willful damage to public or private property; workplace violence or intimidation

What is the standard? (Continued)

- *Enterprise Wire Co.* 46 L.A. 360 (1966)
 - Just cause means:
 - Appropriate, substantive investigation
 - Appropriate notice and due process (see also *Laudermill*, 470 U.S. 532 (1985))
 - Decision based on the evidence
 - Punishment that fits the crime

What is the Procedure?

- First comes the discipline or termination letter, then:
- ARM 2.21.8017
 - (1) Step I is the **informal resolution**. Both the employee and supervisor are encouraged to resolve the grievance informally whenever possible.
 - (2) Step II is the **formal grievance**.
...
 - (3) Step III is the **review by a department head**...
...
- Note that there are deadlines/timelines associated with each step

A Note About Discipline

- There is a difference between **progressive discipline** and **summary discharge**
 - Ideally an employee has notice and an opportunity to attempt to correct their behavior through progressive discipline
 - Note: disciplining **new** bad behavior does not count as progressive discipline – progressive discipline is when you discipline the **same behavior** multiple times
 - Sometimes, however, the conduct is so bad (e.g. theft) that summary discharge is appropriate and progressive discipline is not necessary

A Note About the Termination Letter

- **IT IS CRITICAL**
- The termination letter is the **blueprint for the entire grievance process**
- Get advice of counsel as early as possible, but definitely **get counsel to help you write the termination letter**
- Two basic approaches to a termination letter:
 - Be general (vague)
or
 - Include everything and the kitchen sink

Procedure: Step I

So the employee got a termination letter...

Try and work it out.

(Will you please reconsider?)

Procedure: Step II

- ARM 2.21.8017(2)
- Step II is the formal grievance.
 - (a) A formal grievance shall be filed in writing **within 15 working days from the occurrence of the grievable event.** The formal grievance shall be filed with the grievant's immediate supervisor, or the next level above the immediate supervisor. A standard form for filing grievances may be required by an agency.
 - (b) A formal grievance shall **state specifically the law, written rule, policy, and/or procedure violated; when the action occurred, and the remedy desired by the grievant.** It shall be signed and dated by the grievant.
 - (c) Management shall respond in writing to a formal grievance **within 10 working days** from the date it is filed.
 - (d) The grievance is resolved at step II if the grievant accepts management's response, or if the grievant fails to advance the grievance to step III **within 10 working days** of the receipt of management's response.

Procedure: Step III

- ARM 2.21.8017(3)
- Step III is the review by a department head.
 - (a) If a grievant wishes to advance the grievance to step III, the grievant shall notify a management representative designated by the department head. The grievant shall notify the management representative in writing **within 10 working days** of receipt of management's response at step II.
 - (b) If the subject of the grievance is suspension without pay for more than 10 working days, disciplinary demotion, or discharge, the designated management representative shall **order a hearing**, as provided in ARM 2.21.8018. All other grievances shall advance to final review by the department head.
 - (c) The department head shall review the grievance and shall issue the final administrative decision on the grievance either:
 - (i) **within 20 working days** of the grievant's request for final review;
 - (ii) **within 10 working days** of receipt of the hearings summary as provided in ARM 2.21.8018; or
 - (iii) the department head shall notify the grievant and management concerning any additional actions ordered which will delay the decision.
 - (d) At the discretion of the department head, the final review may include review of the grievance form, review of management's response, and review of the record of any investigation or hearing, or the department head may authorize an additional investigation, may conduct a discussion with the grievant or may order a hearing.
 - (e) The department head's final decision shall be issued in writing. This is the final step of this grievance procedure.

Step III: Hearing

- ARM 2.21.8018
 - (1) A hearing shall be conducted at step III, if the grievance is filed as the result of a **suspension without pay for more than 10 working days, a disciplinary demotion, or a discharge.**
 - ...
 - (5) **Within 30 working days of the selection of the hearings examiner, the hearings process shall be completed,** and the hearings examiner shall submit a written summary of findings and shall make a non-binding recommendation for resolution to the department head.
- Note: this timeline can change by (written) agreement of the parties

Step III: Getting a Hearing Examiner

- ARM 2.21.8018
 - (2) Within 10 working days of advancement of the grievance to step III, the designated management representative shall request either:
 - (a) a hearings examiner assigned by the office of the attorney general; or
 - (b) a list of three to five potential hearings examiners from the board of personnel appeals. An examiner shall be selected in one of the following manners:
 - (i) management and the grievant shall agree on one of the hearings examiners; or
 - (ii) each shall alternately strike names from the list and the remaining person shall serve as hearings examiner. The grievant shall strike the first name.
- Note that the Agency Legal Services Bureau (ALSB) of the AG's office may fit under (a) or (b)

Step III: Giving Notice

- ARM 2.21.8018
 - (3) The hearings examiner shall set the time and place for the hearing. The parties shall receive notice of the hearing either personally or by certified mail **not less than 5 working days before the hearing.**
- *Cleaveland Board of Education vs. Lauderhill*, 470 U.S. 532 (1985)
- Maybe MAPA??? MCA 2-4-601 (more on this later)

Step III: The Hearing

- ARM 2.21.8018
 - (4) Both parties shall have:
 - (a) the right to introduce evidence;
 - (b) the right to cross examine;
 - (c) the right to be represented; and
 - (d) the right to a recommendation for resolution based on the recorded evidence and matters officially noticed.
- The rules of evidence and civil procedure (usually) apply
- Check your scheduling order – hearing examiners do things differently!

Step III: MAPA Contested Case?

- Is a Step III grievance hearing a “contested case” under the Montana Administrative Procedure Act (MAPA)?
 - Reasonable minds differ (do you want it to be?)
 - See: MCA Title 2, Chapter 4, Part 6 (contested cases section of MAPA)
 - Bottom line: was there discovery done?
 - If so: probably a contested case
 - If not: probably not a contested case

What is the Remedy?

- Can you ask for damages in a grievance (other than reinstatement)?
- The Wrongful Discharge Act (Title 39, Chapter 2, Part 9) is probably the exclusive remedy for money damages
 - **39-2-911. Limitation of actions.** (1) An action under this part must be filed within 1 year after the date of discharge.
(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. **The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part.** If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.
(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

Appeal

- Two options for appeal
 - Appeal the hearing examiners decision like a contested case
 - File suit under the wrongful discharge act (after exhausting your admin remedies)
- Can't do both (no eating your cake too) - *Christie v. DEQ*, 2009 Mont. 227, 220 P.3d 405

Thank You!

- Katherine Orr
- Assistant Attorney General
- Agency Legal Services Bureau